IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.16 OF 2006

WITH

CIVIL APPLICATION NO.20 OF 2006

Mr.Prakash Boolu Kundar,
age 37 years, occ.business,
r/o.Kumar Park "L" Building,
Flat No.5, Bibvewadi, ...Appellant/
PUNE - 411 037. Defendant

Versus

Shankar Aithu Poojari,
age 48 years, occ.business,
r/o.E-7a, Jawale Complex,
Vadgaon Sheri, PUNE - 411 014.

And

203-C, 2nd floor, Lunkad Valaneia,
Gymkhana Road, Viman Nagar, ...Respondent/
PUNE - 411 014. Plaintiff

.....

Mr.R.D.Soni i/b Ram & Co. for Appellant.

Mr.A.V.Anturkar for Respondent.

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CORAM: A.M.KHANWILKAR, J.

JUNE 22, 2006.

ORAL ORDER :

1. Heard Counsel for the parties. Perused the relevant documents on record.

2. Admit. Mr.Anturkar waives notice for Respondent.

3. As short question is involved, Appeal is taken up for hearing forthwith, by consent.

4. This Appeal from Order takes exception to the Judgment and Order passed by the Joint District Judge, Pune dated November 18, 2005 in Arbitration Petition No.960 of 2002 filed under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act'). The lower Court was pleased to pass the following order :

"ORDER

1. The opponent is restrained from interfering in the day to day management of the business of the firm and shall not withdraw amount from account of the firm, until the decision of the dispute before arbitrator and till award is put up for execution.

2. The opponent is permitted to visit the Durga Restaurant & Bar which is the place of business of the firm.

3. The applicant shall maintain accounts of the business of the firm and extract of such accounts of the firm.

4. Opponent is also at liberty to check accounts of the firm.

5. The application is disposed off. No order as to costs."

5. Briefly stated, the Appellant and Respondent started partnership firm in the name and style as Durga Restaurant and Bar. The partnership came into existence in terms of the Partnership Deed dated 25th June 2001. The Partnership Deed contains arbitration clause. I shall make reference to the relevant clauses at the appropriate places a little later.

6. It is the case of the Respondent that the Partnership Deed executed between the parties was not acted upon and the terms were modified. According to the Respondent, as per the understanding between the parties, the Appellant was carrying on business for three and a half years and the Respondent did not interfere in the conduct of the business of the firm during the relevant period. It is the case of the Respondent that proposal was given to the Appellant that the Respondent will take over management of the business of partnership on 1st August 2004 and

would carry on the same for next three and a half years and that the Appellant should not interfere in the Management during such time. According to the Respondent, the Appellant agreed for that arrangement, for which Memorandum of Understanding was also prepared and signed by the parties on 1st August 2004. This document was executed in the presence of Vinod Shetty, Balkrishna Suvarna, Jaya Poojari, Rajesh Rai and Dayanand Shetty - Chartered Accountant of the firm. It is the case of he Respondent that inspite of such understanding arrived at between the parties, the Appellant threatened to interfere with the management of the hotel. Besides, the Appellant immediately withdrew sum of Rs.50,000/- (Rupees Fifty Thousand) from the account of the firm which information was received from the Bank. In this backdrop, the dispute arose between the parties.

7. As mentioned earlier, the Partnership Deed contains arbitration clause, for which, the dispute will have to be adjudicated in arbitration proceedings. The Respondent, however, filed application under Section 9 of the Act, 1996, on which Application, the order which is impugned in

the present Appeal from Order came to be passed. So far as Appellant is concerned, the Appellant stoutly denies execution of any Memorandum of Understanding. According to the Appellant, there was no concluded contract in relation to the negotiations which took place on 1st August 2004. The case of the Appellant, however, is that the Appellant being partner of the firm having 50% share therein was entitled to manage the affairs of the firm along with the Respondent. The Appellant denied execution of the Memorandum of Understanding dated 1st August 2004. Besides, according to the Appellant, no specific clause has been made in the Memorandum of Understanding about the tenure when the Respondent will hand over the management of the hotel to the Appellant. Besides, the terms in the Memorandum of Understanding are so onerous so far as the Appellant is concerned that the inevitable conclusion will be that the said Memorandum of Understanding is unjust and will not be accepted by any prudent person. According to the Appellant, the relief claimed by the Respondent in the Application was exceeding the scope of order to be passed by the Trial Court under Section 9 of the Act. On the above basis, the Appellant resisted

the Application. However, the lower Court has allowed the Application preferred by the Respondent.

8. The first reason that has weighed with the lower Court, as can be discerned from Para 17 of the impugned Judgment is that prima facie, there was agreement between the parties that the management of the business would be handed over to the Respondent on 1st August 2004, so that, he can conduct the business exclusively for a period of three and a half years. The second reason which has weighed with the lower Court can be discerned from paragraph 18 of the impugned Judgment which records that the factum of meeting held on 1st August 2004 as stated by the Respondent will have to be accepted. It will have to be therefore assumed on the basis of probability that some arrangement was reached between the parties about the conduct of the business. The third reason as is recorded by the lower Court in Paragraph 19 of the impugned Judgment is that the Appellant has unilaterally withdrawn Rs.50,000/- (Rupees Fifty Thousand) from the account of the firm. Because of this conduct, the Respondent was entitled for the

relief as granted in favour of the Respondent. In Paragraph 20 of the impugned Judgment, the lower Court has concluded as follows :

> "20. Prima facie, therefore, applicant has made out a case that he is participating in the business of the firm and opponent has withdrawn amount of Rs.50000/- without informing him. Therefore, he has made out case that he should be allowed to carry on business of the firm and opponent should not interfere in the business of the firm or withdraw any amount from the bank."

9. The lower Court has also answered the issue of balance of convenience and irreparable loss in favour of the Respondent. Consistent with the said finding, the impugned order which is extracted in the earlier part of this Judgment, came to be passed.

10. Having considered the rival submissions and after going through the pleadings on record, I find substance in the grievance made on behalf of the Appellant that the approach of the lower Court in granting relief as claimed cannot be sustained. The first reason recorded by the lower Court is that it is common ground that meeting was held on

1st August 2004, in which certain arrangement was agreed upon by the parties, under which, the Respondent was to take over the management of the business of the firm to the exclusion of the Appellant. This opinion recorded by the lower Court, it is rightly submitted, cannot be sustained. This is so because once there is written partnership agreement between the parties. The said document will have to be given preference to the oral version of the Respondent or his witnesses. The Partnership Deed dated 25th June 2001 makes no provision for such arrangement. On the other hand, Clause 11 of the agreement provides that both partners shall jointly manage the partnership business. Clause 8 of the agreement postulates that both partners would share profit and loss equally. However, the Court below has drawn inference on the basis of the version of the Respondent and his witnesses - to the effect that some meeting had taken place on 1st August 2004, wherein it was agreed between the parties to alter the condition, to answer the issue in favour of the Respondent. In the first place, the lower Court has clearly overlooked the case as was made out by the Respondent in the Application filed under

Section 9 of the Act. In the Application, it is stated that the terms of the Partnership Deed were not acted upon and were modified. It is then stated that the opponent (Appellant herein) proposed that he would carry on business of partnership for the first three and a half years and the Respondent will not interfere in the conduct of the business of the firm. There is no documentary evidence to support the position that the terms of the Partnership Deed were not acted upon or were modified. What is relevant to note is that the lower Court proceeds to hold that some arrangement was arrived at in the meeting held on 1st August 2004. As mentioned earlier, from the case made out in the Application by the Respondent, it is seen that the suggestion is that the arrangement that each partner shall carry on the business to the exclusion of the other for a period of three and a half year respectively, was arrived at right at the commencement of the partnership business and on which account, the Appellant initially was allowed to mange the business of the firm till 1st August 2004. This stand of the Respondent, however, is not substantiated by any document.

11. It is not necessary for me to go into the discrepancies of the version occurring in the two affidavits of the witnesses filed by the Respondent in support of the fact that some meeting had taken place on 1st August 2004. So far as the finding reached by the lower Court that some meeting had taken place on 1st August 2004, though cannot be doubted, the further conclusion drawn by the lower Court that the Memorandum of Understanding has been accepted by both the sides and it amounts to concluded contract so as to supersede the terms of the Partnership Deed, the same is not substantiated from the record. On the other hand, I find substance in the argument canvassed on behalf of the Appellant that no prudent person would accept the arrangement provided in the Memorandum of Understanding. The draft Memorandum of Understanding on which certain corrections have been carried out, xerox copy thereof has been placed on record. Even if the said document is read as a whole, there is nothing in this document to suggest as to in what manner the Appellant will be entitled to share the profits in the firm. On the other hand, it appears that the Respondent

alone would be entitled to carry on the management of the hotel from 1st August 2004 indefinitely and entitled to operate the accounts singularly. It is therefore too much to assume that any prudent person would accept such arrangement, especially when he has contributed to the partnership business substantially.

12. Be that as it may, although the Respondent came to the Court with specific plea that the said document (Memorandum of Understanding) has been signed by the parties in the presence of the witnesses, however, that fact is not established. On the other hand, from the xerox copy of the Memorandum of Understanding produced along with the compilation, it is seen that none of the partners have signed the said document. In that sense, it is not a concluded contract. Assuming that the Respondent's case was to be accepted that this document superseded the terms of the Partnership Deed, in that case, there is substance in the argument of the Appellant that the arbitration clause provided in the Partnership Deed will also stand superseded. In the Memorandum of Understanding, however, no provision has been made

for resolving the dispute through arbitration. Suffice it to observe that the basis on which the Trial Court proceeded to give credence to the ocular evidence to denude the Appellant from participating in the affairs of the firm in the face of written partnership agreement, cannot be countenanced.

13. Counsel for the Appellant has rightly relied on the decision of the Apex Court in the case of **Roop Kumar vs. Mohan Thedani reported in AIR 2003 SC 2418.** In Paragraphs 19 and 20, the Apex Court has expounded as follows :

> "19. Sections 91 and 92 apply only when the document on the face of it contains or appears to contain all the terms of the contract. Section 91 is concerned solely with the mode of proof of a document which limitation improved by Section 92 relates only to the parties to the document. If after the document has been produced to prove its terms under Section 91, provisions of Section 92 come into operation fr the purpose of excluding evidence of any oral agreement or statement for the purpose of contradicting, varying adding or subtracting from its term. Sections 91 and 92 in effect supplement each other. Section 91 would be inoperative without the aid of Section 92, and similarly Section 92 would be inoperative without the aid of Section 91.

> 20. The two sections are, however, difference in some material particulars. Section 91 applies to all documents, whether they purport to dispose of rights or not, whereas Section 92 applies to documents which can be described as dispositive. Section 91 applies to documents which are both bilateral and unilateral, unlike Section 92 the application of which is confined to only to bilateral documents. (See Bai Hira Devi and others v. Official Assignee of Bombay, AIR 1958 SC 448). Both these provisions are based on "best evidence rule". In Bacon's Maxim Regulation 23, Lord Bacon said "The law will not couple and mingle matters of speciality, which is of the higher account, with matter of averment which is of inferior account in law". It would be inconvenient that matters in writing made by advice and on consideration, and which finally import the certain truth of the agreement of parties should be controlled by averment of the parties to be proved by the uncertain testimony of slippery memory."

14. Insofar as the present case is concerned, the document which has been executed between the parties, is Agreement dated 25th June 2001, which has been produced on record. Insofar as the the document in the form of Memorandum of Understanding relied upon by the Respondent, there is doubt about its execution. In other words, the same cannot be used against the Appellant unless it is proved that the Appellant has accepted the terms provided

therein. The fact that the Respondent was exclusively in control of the business for the first three and a half years will however make no difference to the rights of the parties specified in the partnership agreement. All such issues will have to be resolved in arbitration proceedings.

15. In my opinion, it is not possible to accept the claim of the Respondent that the Memorandum of Understanding dated 1st August 2004 is a concluded contract between the parties. Counsel for the Respondent, however, relied on four circumstances to persuade this Court that the said Memorandum of Understanding is not only concluded between the parties, but in fact, the parties have acted upon the same. For this purpose, learned Counsel for the Respondent submitted that although the Respondent has relied upon affidavit of two witnesses, no attempt was made by the Appellant to produce even one witness amongst the persons who were present at the meeting to dispute the position stated by the Respondent. The second circumstance pressed into service on behalf of the Respondent is that during the pendency of the proceedings, the Appellant had moved an application praying that the

Respondent be directed to settle the loan account of the Appellant in terms of the provisions made in the Memorandum of Understanding, which presupposes that the Appellant concedes the existence and binding nature of the terms of the Memorandum of Understanding. The third circumstance relied upon by the Respondent is that the Appellant surreptitiously withdrew sum of Rs.50,000/- (Rupees Fifty Thousand) with the help of a cheque which was in his possession for almost three years. The Appellant has therefore misused his position. It is lastly contended on behalf of the Respondent that the Appellant virtually accepts the position that since August 2004, the Respondent is exclusively in the control of the management of hotel business of the firm; prior to that since the execution of the Agreement dated 25th June 2001, the Appellant was in complete control of the management of the hotel business of the firm. Thus, if it was a case of dispossession, the Appellant ought to have made grievance about the same in or soon after August 2004. Since that has not happened, it will have to be assumed that the Appellant acted upon the terms of the Memorandum of Understanding. All these circumstances pressed

into service, though appear to be attractive, it is not possible to countenance the same. As is mentioned earlier, so long as the execution of the document (Memorandum of Understanding) is not established, it is not possible to accept the claim of the Respondent that the terms of the original Partnership Deed have been modified or superseded to the extent claimed by the Respondent. The document of Memorandum of Understanding has not been executed between the parties. None of the partners have signed the said document. In such a situation, it will not be possible to proceed on the assumption that the parties have acted upon the Memorandum of Understanding in its letter and spirit. The fact that the Appellant has not produced affidavit of any other witness does not take the matter any further. Insofar as the second circumstance that the Appellant moved application before the Trial Court to direct the Respondent to settle his loan account also is of no consequence. The Appellant has countered this by contending that, that course was adopted as the Appellant apprehending coercive action from the bankers if the instalments were not paid in time. Nothing is brought to my notice that Appellant has conceded in

the Application that he has accepted the terms of Memorandum of Understanding. Similarly, the fact that the Appellant surreptitiously withdrew sum of Rs.50,000/- (Rupees Fifty Thousand) cannot be the basis to hold that the Appellant acted upon the Memorandum of Understanding. Here, it may be noted that the Appellant has his explanation as to the circumstances in which he had withdrawn that amount. Further, it is seen that the Appellant has deposited that amount later on. Even the last circumstance relied by the Respondent cannot be accepted, as Appellant having acted upon the terms of Memorandum of Understanding. The Appellant contends that inspite of equal rights to both partners, the business was managed by the Appellant for the initial period, as the Respondent did not make himself available. Moreover, even during that period, both the parties shared the profit and loss in terms of the partnership agreement, which position is supported from the audited accounts of the firm, placed on record. It is not as though the Appellant enjoyed the entire profits during that period. However, in the Memorandum of Understanding, the arrangement provided is that on and from August 2004, the Appellant will not be

entitled to share or withdraw any profit or amount from the business of the firm. Suffice it to observe that the claim of the Respondent that the Appellant acted upon the Memorandum of Understanding, cannot be sustained.

16. The reasons already recorded earlier incidentally also deal with the second reason which has weighed with the lower Court. The lower Court has noted on the basis of "probability" that some arrangement was arrived at between the parties in the meeting held on 1st August 2004. The drastic order passed by the lower Court cannot be sustained on probabilities. Besides, the issue which has been resolved by the lower Court, as is rightly contended by the Counsel for the Appellant, in terms of Section 9 of the Act, the Court has power to pass interim order for matters provided therein (Section 9). Essentially, such power is exercised for preservation of the property and not to oust any party of its legitimate entitlement. Counsel for the Appellant has rightly relied on Section 12 of the Indian Partnership Act, 1932 which provides that every partner has right to take part in the business, subject however to the contract between

the parties. It is possible to argue that the arrangement arrived at on 1st August 2004 is a contract between the parties. But for the reasons already recorded earlier, I am not inclined to accept that the negotiations held in that meeting were translated into a concluded contract. So long as there was no concluded contract, the terms referred to in the Memorandum of Understanding cannot be the basis to denude the Appellant of his legal right to participate in the affairs of the partnership business.

17. The other reason which has heavily weighed with the Trial Court is that the Appellant misconducted himself by surreptitiously withdrawing sum of Rs.50,000/- (Rupees Fifty Thousand) from the account of the firm. Insofar as this finding is concerned, according to the Appellant, the lower Court has not considered the stand taken by the Appellant in its proper perspective, in that, the case of the Appellant was that there was arrangement between the parties that the parties were entitled to withdraw amount from the firm account. As per that understanding, even the Respondent has withdrawn sum of Rs.1,00,000/-

(Rupees One Lakh) in the past. To support this submission, reliance is placed on the audited accounts of the firm, which discloses that Respondent has also withdrawn sum of Rs.1,00,000/- (Rupees One Lakh) as is reflected in the accounts ended on 31st March 2004 - when admittedly, the Appellant was exclusively in the management of hotel business of the firm. The withdrawal of Rs.1,00,000/- (Rupees One Lakh) made by the Respondent, however, has been overlooked by the lower Court on the reasoning that the relevant document was not produced. Be that is it may, the fact of withdrawal of amount by both the parties for the present, need not detain me to pass the order which I propose to pass hereunder.

18. Indeed, the lower Court has answered the issues of balance of convenience and irreparable loss in favour of the Respondent. However, as the issue of prima facie case is answered against the Respondent, the finding of the lower Court on other issues is of no avail. The lower Court has observed that if the Appellant is allowed to participate in the business and withdraw the amount as was withdrawn by him earlier, that will not be

beneficial to the business and it would jeopardise the business. However, if the Respondent is allowed to conduct the business to the exclusion of the Appellant, then there is similar possibility that the matter may be precipitated. The Appellant, in law, is entitled not only to participate in the affairs of the firm but also share profit equally. While answering the issue of irreparable loss, the lower Court observed that if the Respondent is directed to maintain accounts of the firm and the Appellant is permitted access to the accounts to check the same, that would mitigate the situation. Ordinarily, this reasoning would have found favour if the Respondent had succeeded in making out prima facie case. As is mentioned earlier, in law, the Appellant has right to participate in the affairs of the business. Merely permitting the Appellant to visit the business premises or checking accounts of the firm is of no avail. Interestingly, the lower Court even rejected the claim of the Appellant to pay Rs.25,000/- (Rupees Twenty-five Thousand) per month by way of interim profit. This perhaps is on the assumption that the Appellant was not entitled to share the profit at all, during the period when

Respondent would conduct the business, which cannot be countenanced.

19. In my opinion, it is certain that the relations between the partners have irretrievably broken. The Respondent has alleged distrust against the Appellant, for Appellant having withdrawn sum of Rs.50,000/- (Rupees Fifty Thousand) surreptitiously. There may be substance in the argument of the Respondent that the cheque which was in possession of the Appellant for over three years has been misused for such withdrawal. Even so, in law, the Appellant has right to take part in the conduct of the business and to share the profits till the partnership is continuing. The nature of order that has been passed by the lower Court restrains the Appellant from participating in the day-to-day management of the business of the firm. The management of the business of the firm on the other hand will rest with the Respondent to the exclusion of the Appellant. Moreover, no provision has been made even in the impugned order for reasonable withdrawal to be made by the Appellant to avail of

share in the profit of the firm.

20. Taking overall view of the matter, in my opinion, although there is no specific relief claimed for appointment of Court Receiver, in the interest of justice and to protect the hotel business which is the subject matter of the dispute in arbitration, it will be appropriate if the the management of the business is taken over by the Court Receiver forthwith. The Court Receiver shall then permit both the parties to bid and appoint person who offers the highest bid as agent of the Court Receiver to conduct day-to-day hotel business. The Court Receiver shall appoint the highest bidder as his agent on such other terms and conditions as may be found necessary to ensure that the agent so appointed maintains proper books of accounts and also provides inspection of such accounts at all times to the other partner. Such order will meet the ends of justice.

21. Accordingly, even though this Appeal succeeds and the order which is impugned herein is set-aside, in the peculiar facts of the present

case, I am inclined to pass the following order :

(1) The impugned Judgment and Order is set-aside.

(2) The Application preferred by the Respondent under Section 9 of the Arbitration Act will stand disposed of by this order with direction that Court Receiver, High Court, Bombay is appointed as Court Receiver in respect of the management of hotel business of the firm, who in turn, shall take charge of the hotel business forthwith and then permit the respective parties to give offer and to accept the claim of the highest bidder who shall be appointed as agent of the Court Receiver on such terms and conditions as may be found necessary by the Court Receiver. This arrangement to continue till the conclusion of the arbitration proceedings and passing of the award till its execution.

(3) Appeal allowed on the above terms with no order as to costs.

(4) At this stage, Counsel for the Respondent prays that the operation of this order be stayed to enable the Respondent to take up the matter in appeal before the Apex Court. This being reasonable request, is acceded to, but on certain conditions. It is ordered that the Court Receiver shall proceed to take symbolic possession of the hotel business forthwith but shall not take physical possession thereof, so as to dispossess the Respondent who is presently conducting the business of the firm. Respondent assures through Counsel that he shall not create third party right or deal with any of the furniture, fixtures, and fittings lying in the suit premises during the interim period.

(5) It will be open to the Court Receiver while taking symbolic possession to conduct inventory of all the articles,

furnitures and fittings lying in the suit premises.

(6) This arrangement shall operate for a period of three weeks from today. Thereafter, if there is no interim stay from the Apex Court, the Court Receiver will be free to proceed in the matter in terms of the observations made in the earlier part of this order.

(7) Appeal from Order and the cognate Civil Application disposed of on the above terms.

(8) All concerned to act on an ordinary copy of this order, duly authenticated by the Office.

A.M.KHANWILKAR, J.